

**KIRKLAND & ELLIS**  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

855 Fifteenth Street, N.W.  
Washington, D.C. 20005

Laurence A. Urgenson, Esq.  
To Call Writer Direct:  
202 879-5145

202 879-5000

Facsimile:  
202 879-5200

June 3, 1994

Patrick Fitzgerald, Esq.  
Assistant United States Attorney  
Southern District of New York  
One St. Andrews Plaza  
New York, New York 10007

Re: United States vs. Marc Rich and Pincus Green

Dear Mr. Fitzgerald:

Bob Fink and I very much appreciated your meeting with us to discuss the case involving our clients Marc Rich and Pincus Green. While we and our colleagues continue to work on an approach which will lead to a satisfactory settlement, we thought it might be helpful to share some thoughts and suggestions prompted by our meeting and more recent telephone conversation.

After eleven years, the time has come to resolve this case and we believe that this process should start with a candid exchange of views. We understand your view of this case. Given your understanding, it would seem that a resolution based upon the current indictment would be fair, and that selecting counts that fit the evidence would be easy. We seek an opportunity to present another point of view.

In our view, the charges in the current indictment do not provide an appropriate basis for disposition of this case. We believe this for two reasons. First, there is more than ample reason to believe that the defendants paid all the taxes they owed and properly reported all of their domestic oil trading profits. We base this conclusion upon our own comprehensive review and consultations with two of the leading tax authorities in the country who stand ready to visit your office and explain their conclusions. Second, neither the law nor the policies of the Department of Justice support the RICO, fraud, or trading with Iran charges in the in the current indictment. For the most part, the issues appear on the face of the indictment and can be readily evaluated.

We recognize that missteps by the defense are largely responsible for the enhanced dimensions of this case. These missteps included a flawed decision by counsel not to be

KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.

June 3, 1994

Page 2

forthcoming on the facts coupled with dubious legal maneuvers that led to the notorious document disputes during the grand phase of the investigation. Because of the confusion, anger and intense media interest that surrounded the grand jury investigation, the parties never engaged in an open dialogue regarding the merits of this case. We would like an opportunity to satisfy you that this case does not involve the inflammatory tax fraud, false energy reporting, RICO or trading with Iran violations. We would then like to address the false statement allegations and other matters you mentioned during our discussions. In all events, we believe that a straightforward legal discussion among counsel would soon establish the fair dimensions of the case and lead to a proper resolution.

We know that you do not share our optimism given the long history of the pretrial proceedings and your present understanding of the case. However, the discussion we seek concerns clear and important issues which we assure you can be determined with a modest investment of time and without running afoul of your office policies.

We would like to begin by asking that you and any government tax experts you may choose meet with Professors Bernard Wolfman of Harvard and Martin D. Ginsburg of Georgetown, so that you can personally evaluate their conclusions. We urge this approach because the tax allegations underlie so much of the indictment, and because the merits of our tax position can be quickly evaluated. We, of course, stand ready to begin by addressing a different aspect of the case should you find it more useful.

In considering our request, we ask that you take into account the following additional thoughts regarding the matters raised during our discussions.

1. The Need to Consider the Tax Analysis of Professors Ginsburg and Wolfman

As you noted during our meeting, the core of the indictment is the charge that Marc Rich & Co. International Ltd. ("MRI") evaded roughly \$50 million in federal income tax by failing to report income and improperly taking deductions arising from a series of crude oil transactions. Moreover, since MRI was a crude oil reseller subject to additional income reporting requirements, its alleged failure to include the income in

KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.

June 3, 1994

Page 3

certain regulatory reports is also charged as a scheme to defraud the Department of Energy.

Professors Wolfman and Ginsburg have concluded that what the indictment alleges is unreported "domestic profits" was properly attributed to foreign transactions and, thus, under U.S. law and the governing U.S.-Swiss tax treaty, was not subject to United States tax. Likewise, the so-called "false deductions" were properly treated as a cost of goods sold and, thus, reductions of income. According to Professors Ginsburg and Wolfman, the challenged tax treatment was lawful and proper. Indeed, they believe the government should not win even a civil tax case. In short, their analysis goes to the very core of the government's case and is crucial to defining the true dimensions of this matter.

The Ginsburg/Wolfman analysis is worthy of careful review for three additional reasons. First, Professors Ginsburg and Wolfman are among the most respected tax authorities in the country. Second, the conclusions of Professors Ginsburg and Wolfman (who were not in the case at the time of the transactions) follow the tax treatment actually adopted by the taxpayers taking into account contemporaneous legal advice provided by others; this is not merely an alternative computation method which the taxpayer did not elect, such as in United States v. Helmsley, 941 F.2d 71, 86 (2d Cir. 1991). Third, the Professors' analysis is based upon facts alleged by the government in the superseding indictment and in separate proceedings brought by the Department of Energy in 1985 concerning many of the same transactions.

While there were many individual transactions involved in this case, they all follow the same basic pattern. The corporate defendants engaged in off-shore foreign oil transactions that induced a major U.S. oil company (ARCO or Charter) to sell on-shore domestic controlled oil at the low controlled prices. This foreign-domestic link is critical to the Department of Energy's analysis in the subsequent administrative action brought in 1985 against ARCO concerning the very transactions that form the bulk of the tax evasion case. It is also critical to the Professors' analysis of the proper tax treatment. Unfortunately, the indictment makes no more than a passing reference to the foreign portions of the transactions at issue.

## KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.  
June 3, 1994  
Page 4

We understand that the impact of the Ginsburg/Wolfman analysis has been discounted as failing to account for certain unspecified facts. Although we have carefully reviewed much of the grand jury material and other information, we are candidly at a loss to determine what these facts could be, or how they could make a difference. We do know the Ginsburg/Wolfman analysis is based upon public record information which is not in dispute. We also know that the prosecutors who conducted the investigation did not then have access to the Ginsburg/Wolfman analysis or to the DOE's 1985 analysis of the ARCO transactions; nor did they have an opportunity before they brought the indictment to review the substantial record of contemporary tax advice which we later provided to your office.

Professors Ginsburg and Wolfman are confident that their analysis is correct and that the tax issues can be quickly explained. Both are prepared to present their conclusions to you and any tax experts you may choose, and to respond to any questions that may be presented.

### 2. The Corporate Guilty Pleas

During our meeting you asked: If our clients are not guilty of the tax fraud in the indictment, why did the corporations plead guilty and pay \$200 million? The answer is simple. The corporate pleas were compelled by the risk of enormous RICO forfeitures and by pretrial restraints and levies that crippled the defendants' ability to do business.

The indictment returned on September 19, 1983, marked the first use of RICO, and RICO forfeiture, in a major white collar case. The indictment applied RICO's most draconian provisions and sought forfeiture of the defendants' entire interest in the enterprise, including hundreds of millions of dollars in interests that were not even claimed to be the proceeds of criminal conduct. In light of the threat of ruin posed by these potential RICO forfeitures, the pleas became the only course open to the corporate defendants.

In addition to the threat of RICO forfeitures, the corporate defendants were crippled by pretrial restraints that included hundreds of millions of dollars in asset freezes and by a cut-off of credit and trading activity caused by the enormous forfeiture claims. Even before the indictment, restraining notices were served to assure collection of fines arising from

## KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.  
June 3, 1994  
Page 5

disputes concerning the production of European documents. In testimony before a Congressional Committee chaired by Representative Wise on December 4, 1991, former Assistant U.S. Attorney Morris Weinberg, Jr. stated that:

"In essence, the restraining notices made it impossible for Marc Rich to do business in the United States. As a commodities trader, Marc Rich could not do business without a credit line and as a result of the restraint notices as well as the daily publicity most financial institutions refused to do business with Marc Rich until his problems with the United States government were resolved."  
(emphasis added).

Moreover, while these restraints remained in place, the IRS, shortly after the indictment, issued a jeopardy assessment totalling more than \$90 million. Because a jeopardy assessment -- even though entirely pre-trial -- has the same effect as a judgment, the IRS served notices of levy on many companies doing business with the corporate defendants, including their principal banks. As a result, virtually all of MRI's funds in the United States were cut off.

The combined use of disproportionate RICO forfeiture claims and restraining orders was unprecedented in a white-collar case, and its coercive effect is beyond doubt. Recognizing the coercive effect of overdrawn forfeitures, the Department of Justice in 1989 adopted rules prohibiting prosecutors from seeking forfeitures or pretrial restraints that are disproportionate or disrupt normal, legitimate business activities. In addition, the Department of Justice acknowledged that Congress did not intend RICO to be used in tax evasion cases. These policies are set out in two "blue sheet" amendments to the United States Attorneys Manual ("USAM") ¶ 9-110.415 & ¶ 6-4.211(1).

We are not seeking to revisit the validity of the plea agreement. Rather, we seek to explain why the corporate pleas should not be treated as admissions of guilt by our clients, thereby hindering you from seriously considering their position. The law certainly supports our view. Courts have uniformly followed the view that a co-defendant's guilty plea cannot be used as substantive evidence in a criminal trial. This refusal to view the guilty plea of one defendant as probative of the



## KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.  
June 3, 1994  
Page 6

guilt of another recognizes that a guilty plea may be motivated by factors unrelated to the guilt of a co-defendant. See e.g., United States v. Blevins, 960 F.2d 1252, 1260 (4th Cir. 1992); United States v. Griffin, 778 F.2d 707, 711 (11th Cir. 1985).

As noted above, the threat of a ruinous RICO forfeiture of all "sources of influence" and the accompanying pretrial restraints placed irresistible pressure upon the corporate defendants to settle. Corporate guilty pleas obtained in these circumstances say nothing about the guilt or innocence of our clients and should not be a barrier to a full discussion of the charges.

### 3. This Is Not a Rico Case

You mentioned that the presence of a RICO charge in the original indictment would influence your thinking regarding an appropriate disposition of this case. We understand your point but ask you to consider whether this matter could proceed as a RICO case today. The use of RICO and wire fraud offenses to prosecute tax charges violates the policy of the Department of Justice, adopted to address the problems highlighted in the Princeton/Newport case. See USAM 6-4.211(1), adopted July 14, 1989. Further, the RICO predicates based on alleged use of the mails to defraud the Department of Energy are defective under McNally v. United States, 483 U.S. 350 (1987). In light of these deficiencies, the presence of RICO charges in the indictment should not have any bearing on our discussions.

### 4. Our Clients Do Not Seek Preferential Treatment

You expressed concern that if you undertake a serious review of this case you will be affording our clients preferential treatment. We ask that you consider a number of points that dramatically distinguish this case from other matters that your office may be asked to review on behalf of defendants who have not subjected themselves to the jurisdiction of the court.

- First, there is simply nothing preferential in seriously examining an analysis, such as that of Professors Ginsburg and Wolfman, which authoritatively questions the central premise of the government's case.

## KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.

June 3, 1994

Page 7

- Second, in examining many of the transactions at issue here, the Department of Energy collected millions of dollars from ARCO based upon a factual analysis that contradicts the superseding indictment. Although the superseding indictment fails to take into account the linkage between the domestic transactions and their foreign counterparts, the Department of Energy determined that these foreign and domestic transactions were in fact linked. Professors Ginsburg and Wolfman also concluded that the linkage of the foreign to domestic transactions is critical in determining the proper tax position.
- Third, no other companies have ever been indicted for energy practices like those alleged here, including major oil companies that engaged in similar activities. During the 20 year history to date of enforcement under the Mandatory Allocation and Pricing Program (including actions brought long after the regulations were repealed in 1981), several thousand enforcement actions were brought against various firms in the petroleum industry. Except for a handful of extreme cases that involved practices not present here -- most notably miscertification -- enforcement has been accomplished exclusively through administrative proceedings. By salient example, ARCO profited substantially from many of the same linked oil transactions described in the indictment, yet received only an administrative sanction.
- Fourth, our clients were charged with RICO violations and RICO forfeitures that, as discussed above, should not have been brought.
- Fifth, the charges of unlawful dealings with Iran were then, as now, defective. The superseding indictment partially acknowledges this deficiency by dropping the Iranian charges against the corporate defendants.
- Sixth, for much of this case, the government seemingly labored under the misapprehension that the defendants had agreed to the miscertification of oil; indeed, the original indictment so alleges. In March 1984 the allegations of miscertification were finally dropped.

## KIRKLAND & ELLIS

Patrick Fitzgerald, Esq.  
June 3, 1994  
Page 8

In testimony regarding the indictment of our clients, AUSA Weinberg told the Wise Committee that the case

"ended after Marc Rich fled, his company ended up paying a \$150 million fine, had already paid \$21 million in contempt fines, forfeited another \$40 million in tax deductions, had lost an estimated \$500 million to \$1 billion in revenues, and had been tarnished and tainted and represented basically as one of the world's greatest criminals."

Our clients have been "tarnished and tainted," lost up to \$1 billion in revenues, fined \$170 million and forfeited \$40 million, for the very transactions where others, if charged at all, received only an administrative sanction. In light of this, and the many other factors distinguishing this case from others, we do not believe that discussions on the merits are unwarranted.

### Conclusion

Nothing in the history of this case could be said to crown the defense with glory or a halo. But we also believe that this history distinguishes this case from others in a way that requires consideration of the very real issues raised by the indictment -- issues which candidly should have been forthrightly presented to the government over a decade ago. For this lapse, and for the problems that ensued, the defendants have already paid an enormous price.

Your office's past discussions with defendants absent from the jurisdiction, including the most recent agreement in the Vaskevitch case, demonstrate that nothing in the history of this case, including the defendants' absence, forecloses such a dialogue. The Ginsburg/Wolfman analysis raises a fair question. Providing a considered answer would not constitute preferential treatment. And more importantly, it would provide a framework for finally resolving this matter.



KIRKLAND & ELLIS

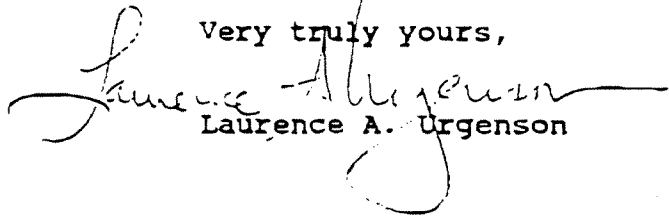
Patrick Fitzgerald, Esq.

June 3, 1994

Page 9

In all events, we appreciate your courtesy in receiving our views and look forward to hearing from you regarding our request for a meeting with Professors Ginsburg and Wolfman or any other steps which you believe would be helpful.

Very truly yours,

A handwritten signature in cursive script, reading "Laurence A. Urgenson". The signature is fluid and extends to the right with a long horizontal stroke.

Laurence A. Urgenson